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IN THE

Supreme Court of the United States

SPENCER WADDELL,

Petitioner,

—v.—

VALLEY FORGE DENTAL ASSOCIATES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err by holding, in conflict with other Circuits, that the "direct threat" defense to a discrimination claim under the Americans With Disabilities Act – which applies when a plaintiff with a disability poses a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation," 42 U.S.C. § 1211(3) – is established as a matter of law when there is even an immeasurably low and purely theoretical risk of an event occurring that could cause death?

2. Did the Court of Appeals err by holding, in conflict with other Circuits, that the plaintiff has the burden of disproving the "direct threat" defense as part of the plaintiff's *prima facie* case of discrimination under the American With Disabilities Act?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Spencer Waddell, Petitioner, and Valley Forge Dental Associates, Inc., Respondent.

Valley Forge Dental Associates was acquired by Monarch Dental Associates and is its successor-in-interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

A. Spencer Waddell's Termination 3

B. The Expert Evidence 5

C. The Decisions Below 10

REASONS FOR GRANTING THE WRIT OF CERTIORARI 11

I. This Court Should Grant Certiorari Because the Eleventh Circuit's Holding That As A Matter of Law An Almost Zero, Purely Theoretical Risk of Harm Resulting in Eventual Death Constitutes a Direct Threat Is in Conflict With Controlling Decisions of This Court 12

II. This Court Should Grant Certiorari Because the Eleventh Circuit's Opinion Increases the Confusion Among the Courts of Appeals As To Whether A Purely Theoretical Risk of Serious Harm, Including Death, Is Sufficient to Constitute A Direct Threat As A Matter of Law 18

III. Certiorari Also Is Necessary to Resolve The Conflict Among the Courts of Appeals As To Which Party Bears the Burden of Proof On A Direct Threat Defense. 22

CONCLUSION 24

APPENDIX A1

Court of Appeals Decision A1

District Court Order and Decision A15

TABLE OF AUTHORITIES

CASES

Abbott v. Bragdon, 107 F.3d 934 (1st Cir. 1997), *aff'd in part, vacated and remanded in part*, 524 U.S. 624 (1998) 20

Bragdon v. Abbott, 163 F.3d 87 (1st Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999) 20, 21

Bragdon v. Abbott, 524 U.S. 624 (1998) ..... *passim*

Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988) 21

Dadian v. Vill. of Wilmette, 269 F.3d 831 (7th Cir. 2001) . 23

EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995) 23

EEOC v. Amego, Inc., 110 F.3d 135 (7th Cir. 1997) 22

Hamlin v. Charter Township of Flint, 165 F.3d 426 (6th Cir. 1999) 21

Hartog v. Wasatch Acad., 129 F.3d 1076 (10th Cir. 1997) 23

Hutton v. Elf Atochem N. America, Inc., 273 F.3d 884 (9th Cir. 2001) 23

Montalvo v. Radcliffe, 167 F.3d 873 (4th Cir. 1999), *cert denied*, 528 U.S. 813 (1999) 19

Rizzo v. Children's World Learning Ctrs.,
84 F.3d 758 (5th Cir. 1996) 20, 23

School Bd. of Nassau County v. Arline,
480 U.S. 273 (1987) ..... *passim*

Stafne v. Unicare Homes, 266 F.3d 771 (8th Cir. 2001) ... 23

Waddell v. Valley Forge Dental Associates, Inc.,
276 F.3d 1275 (11th Cir. 2001) 1, 17

STATUTES

28 U.S.C. § 1254 (1) 1

42 U.S.C. § 12111 (3) 1

42 U.S.C. § 12111 (8) 1

42 U.S.C. § 12112 (b) 2

42 U.S.C. § 12113 2

42 U.S.C. § 12113 (b) 12

42 U.S.C. § 12182 (b)(3) 12

OTHER AUTHORITIES

Centers for Disease Control and Prevention,
HIV/AIDS Prevention Update (Nov. 30, 1998),
http://dvd.gov.nchstp/hiv_aids/pubs/faq/
faq30.htm 19

Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures, MORBIDITY & MORTALITY WEEKLY REPORT 1991:
40 (RR. 8): 1-9 7

The Petitioner, Spencer Waddell, respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unreported decision of the federal district court is *Waddell v. Valley Forge Dental Associates, Inc.*, 99-00262-CV-CAP-1 and is reprinted in the appendix. (App. A15). The opinion of the Eleventh Circuit Court of Appeals is *Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275 (11th Cir. 2001) and is reprinted in the Appendix. (App. A1).

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment on December 21, 2001. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12111 (3) provides:

> The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

42 U.S.C. § 12111 (8) provides in relevant part:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that

such individual holds or desires.

42 U.S.C. § 12112 (b) provides in relevant part:

[T]he term "discriminate" includes –
(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee; ...
(3) utilizing standards, criteria, or methods of administration –

> (A) that have the effect of discrimination on the basis of disability;...

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity;...

42 U.S.C. § 12113 provides in relevant part:

Defenses
(a) In general
It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with

business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.
(b) Qualification standards
The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

STATEMENT OF THE CASE

The petition for *certiorari* seeks this Court's review of two issues of law that are central to the interpretation of the Americans With Disabilities Act: *first*, whether a near-zero, purely theoretical risk causing eventual death is sufficient as a matter of law to establish that an individual with a disability poses a "direct threat" to others; and *second*, whether a defendant in an ADA case bears the burden of proof for establishing that a plaintiff's disability poses a direct threat. The facts relevant to the resolution of these questions are set out below; the appeal sought, however, turns on issues of law and not issues of fact.

A. Spencer Waddell's Termination

Dr. Eugene Witkin employed Spencer Waddell over several different periods from 1993 until 1997; between early 1996 and October, 1997, Mr. Waddell worked under the auspices of Valley Forge Dental Associates, Inc, which acquired Dr. Witkin's practice and retained him as a manager.[1] According to Dr. Witkin, Mr. Waddell

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[1]After Mr. Waddell was terminated, Valley Forge Dental Associates was acquired by Monarch Dental Associates, which exists today and is Valley Forge's successor-in-interest (R. 16 (Witkin Dep.), 5). For convenience the defendant-appellee is referred to as "Valley Forge"

performed his job well. (R. 16 (Witkin Dep.), 8-9).

Mr. Waddell is licensed by the State of Georgia as a dental hygienist and performs routine prophylaxis on patients' teeth. (R. 19, Exh. 1 (Waddell Aff.), ¶¶3, 8). As distinguished from the type of care dentists provide, "routine prophylaxis" involves the removal of deposits and accretions below the gumline. (R. 19, Exh. 2 (Marianos Aff.), ¶¶13, 15). Dental hygienists licensed in Georgia do not administer injections. (*Id.*, ¶¶6,7).

In September 1997, Dr. Witkin learned that Mr. Waddell is HIV positive (R. 16 (Witkin Dep.), 24-25). Mr. Waddell was removed from patient care and offered a clerical position at half the pay he had been earning, then was fired when he refused to accept this position. (R. 16 (Whelchel Dep.), 33-36; R. 34 (Waddell Dep.), 128; R. 4 (Answer), ¶3). Dr. Witkin removed Mr. Waddell from his position as a dental hygienist solely because he is HIV positive. (R. 16 (Witkin Dep.), 27, 39). He feared that there was a risk of HIV-transmission to patients and that he would lose patients if they found out that Mr. Waddell has HIV. (R. 16, 24). Dr. Witkin confirmed that he "could not get beyond" his understanding that the risk of HIV transmission could not be eliminated to zero, and that it was "irrelevant" to him whether the actual risk was great or small. (R. 16 (Witkin Dep.), 31-32). [2]

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throughout this brief.

[2] Dr. Witkin has no training concerning HIV transmission, and has never attended any seminars devoted to discussion of HIV and its impact on dentistry or taken any classes on infection control. (R. 16 (Witkin Dep.), 16). He thinks it is possible that HIV is transmitted through sweat. (*Id.*, 22). Dr. Witkin claimed that he reviewed "some" journal articles, but was unable to describe them, (*Id.*) and that somebody at Valley Forge contacted the Centers for Disease Control and Prevention [hereinafter, "CDC"] and was told that there was "a risk" (*Id.* at 20, 29, 31-32.). Dr. Witkin also claimed that he relied on the CDC's 1991 guidelines on

B. The Expert Evidence

The objective, expert medical evidence in this case consisted of testimony that unanimously concluded that Mr. Waddell does not present any real danger of HIV transmission to his patients. Dr. Marianos[3,4] testified, for example, that:

> [D]ental hygienists' fingers and sharp instruments are rarely simultaneously in the oral cavity ... Simply stated, one reason that hygienists' tools may look so intimidating is that they are designed to reach places where the hand cannot go. Routine prophylaxis,

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health care workers with HIV and hepatitis B.

[3] Dr. Donald Marianos holds a Master of Public Health degree and a Doctor of Dental Surgery degree. He currently teaches dental hygiene at Northern Arizona University. (Marianos ¶1). From 1989 to 1997, Dr. Marianos was a Captain in the United States Public Health Service at the CDC in Atlanta, where he was Director of the Division of Oral Health. While serving at the CDC, Dr. Marianos provided technical assistance to international, federal, state and local health organizations in the area of infection control and infectious diseases in dentistry. (*Id.*, ¶2). Dr. Marianos participated in the development of CDC's 1991 protocol concerning the management of HIV positive health care workers. (R. 18, Exh. J), and has worked with the Scientific Committee of the American Dental Association to develop its policies on infection control and HIV. (*Id.*, ¶3).

[4] The affidavits filed by Mr. Waddell's experts, Drs. Joseph Wilber, John Molinari, and Donald Marianos are cited in short form, i.e., with their surname and a paragraph number. The full citations are (R. 19, Exh. 3 (Wilber Aff.)); (R. 19, Exh. 4 (Molinari Aff.)); and (R. 27, Exh. 2 (Marianos Aff.)). The full citation for a supplemental affidavit by Dr. Marianos is (R. 27, Exh. 1 (Marianos. Aff.)); it is referred to herein as "Marianos Supp. Aff."

> including scaling and root planing, may conjure up images of copious blood, and indeed bleeding – on the part of the patient, not the hygienist – is a common consequence of the gum manipulations that occur in the course of regular treatment. However, when one understands how dental hygienists actually perform their duties, and considers that ... transmission would require both a significant injury to the health care worker, despite the presence of adequate barriers, and sufficient bleeding into an open wound or mucous membrane of the patient, and the introduction of a sufficient quantity of virus to overcome the patient's natural defenses, one begins to understand why HIV transmission ... has never been detected from a hygienist to a patient....[O]ne can reasonably say that hygienist-to-patient transmission of HIV is so unlikely that it remains non-detectable and theoretical at most.

(Marianos ¶¶ 14, 15, 16(g)).

Dr. Marianos further testified that "[t]ermination of clinical duty or restriction of practice, on the basis of HIV infection alone, does not comport with accepted public health practice today, nor did it comport with accepted public health practice in 1997." (Marianos ¶21). Dr. John Molinari[5] concurs:

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[5] Dr. John Molinari is currently the Chairman and Professor at the department of Biomedical Sciences at the University of Detroit Mercy School of Dentistry. He has served as a consultant to the American Dental Association Council on Dental Therapeutic and the CDC on infection control and dentistry, the development of universal precautions,

> Taken together, the unanimity of the published studies, the characteristics of HIV, and the efficacy of universal precautions as an additional safeguard against the highly unlikely occurrence of HIV transmission to patients [by a dental hygienist], all militate against practice restrictions, not to mention mandatory termination of practice, for a HCW [health care worker] solely on the basis of his or her HIV infection.

(Molinari ¶21).

It is undisputed that HIV, a fragile pathogen, is not easily transmissible and requires a coincidence of numerous factors to cause transmission. Consequently, even when exposures involving documented modes of transmission (such as blood-to-blood contact) occur, HIV infection usually does not result. There are *no* reports in the literature of HIV transmission from a dental hygienist to a patient.

In 1991, the CDC issued a set of recommendations for management of health care workers with bloodborne diseases. *Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures*, MORBIDITY & MORTALITY WEEKLY REPORT 1991: 40 (RR. 8): 1-9 (hereinafter "1991 Recommendations"). (R. 18, Exh. J). One of its authors was Dr. Marianos. The CDC did not identify any specific procedures that are "exposure-

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and the prevention of transmission of blood-borne pathogens, including HIV, in health care settings. He was Co-Chair of the committee that developed the State of Michigan's guidelines for management of HIV-infected health care workers. He is the co-author of the textbook, *Practical Infection Control in Dentistry* (Lea & Febinger, 2d ed. 1996). (Molinari R.19, Exh. 4 ¶1).

prone," but defined the term generally:

> Characteristics of exposure-prone procedures include digital palpation of a needle tip in a body cavity or the simultaneous presence of the HCW's fingers and a needle or other sharp instrument or object in a poorly visualized or highly confined anatomic site. Performance of exposure-prone procedures presents a recognized risk of percutaneous injury to the HCW, and—if such an injury occurs—the HCW's blood is likely to contact the patient's body cavity, subcutaneous tissues, and/or mucous membranes.

(R. 18, Exh. J at 4; *see* Marianos ¶17).

The CDC did not recommend termination of any health care worker's practice solely because of HIV infection.[6] Under the CDC guidelines, those performing what the agency characterized as "exposure-prone" procedures should appear before an expert review panel for an individualized determination as to whether and under

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[6] Dr. Witkin insisted on summary judgment that he primarily considered the 1991 Recommendations before firing Mr. Waddell (R. 21, Exh. D (Witkin Decl.), ¶2, 4). The document, however, recommends an approach wholly at odds with Dr. Witkin's reflexive action (R. 18, Exh. J). *See* Marianos Supp. Aff., ¶4-5 ("The assertion that CDC officials or employees would have advised a supervising dentist to limit the practice of, or to discharge, a dental hygienist solely because he or she was found to be HIV positive is wholly contradicted by CDC's actual position on the issue, as well as by accepted public health practice in 1997 and in the present day. . . . CDC has never advocated total removal of a functionally capable health care worker, using universal precautions, from clinical duties solely on account of HIV status. There is not now, nor was there in 1997, a perceived epidemiological basis for such an action").

what conditions he or she could continue to perform those procedures. (R. 18, Exh. J at 5).[7]

Mr. Waddell's experts also explained that health care workers' ability to practice safely primarily depends on their individual characteristics, not on the label attached to the procedures they perform. Dr. Wilber testified:

> It is the HCW's overall functional capacity, and practice history, as well as his or her knowledge of and diligence in following universal precautions, that determines whether the HCW is capable of practicing safely. Categorical decisions, based on the nature of the HCW's duties or the procedures he or she performs, are inappropriate given the variable nature of the above factors and the complete ability of a competent, diligent HCW to practice without any threat of HIV transmission.

(Wilber ¶12). *See also* Molinari ¶22.

There is no dispute in this case that Mr. Waddell is

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[7] Guidelines issued by the Georgia Division of Public Health in 1993, to which Mr. Waddell's expert Dr. Wilber was a contributor (Wilber ¶12), likewise reject *per se* exclusions from clinical practice. After reviewing the Georgia guidelines, Dr. Marianos averred that they are "squarely within the mainstream of public health theory and practice concerning HIV positive [health care workers]." (Marianos ¶22).

Dr. Marianos – an originator of the "exposure-prone procedure" concept – emphasized that Mr. Waddell does not perform exposure-prone procedures. Because proper techniques do not require the hygienist to place his hands in the patient's mouth, and because the mouth is not "considered 'poorly visualized' or confined by a hygienist accustomed to working intraorally," (Marianos ¶14), both parts of CDC's definition of the term remain unsatisfied by the routine prophylaxis techniques that Mr. Waddell is licensed to perform. (Marianos ¶19).

functionally capable of performing well as a dental hygienist. He currently provides dental hygiene services to patients of the Oral Health Center at Grady Hospital, where his supervisor rates his skills as superior (R. 19, Exh. 2 (Reznik Aff.), ¶4-5). Nor is there any dispute that Mr. Waddell scrupulously adheres to standard infection control practices. (R. 16 (Witkin Dep.), 35-37; R. 19, Exh. 2 (Reznik Aff.), ¶6; Marianos ¶9; Molinari ¶23;). All three experts testified that Valley Forge's action was contrary to accepted public health practice (Marianos ¶27; Molinari ¶23; Wilber ¶13).[8]

C. The Decisions Below

On the basis of the record described above, the district court ruled that "there is a chance that Mr. Waddell could cut or prick himself and bleed into an open wound of a patient, and reliable medical opinions state that this event can transmit the disease. For these reasons the court finds that Mr. Waddell ... presents a significant risk to the patients of the defendants." (App. A26).

The Eleventh Circuit Court of Appeals affirmed. Under the standard which the Eleventh Circuit employed, Mr. Waddell poses a "direct threat" because "when transmitting a disease inevitably entails death, the evidence supports a finding of 'significant risk' if it shows both (1)

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[8] The American Dental Association, American Dental Hygienists' Association, Infectious Diseases Society of America, Association of State and Territorial Dental Directors, National Alliance of State and Territorial AIDS Directors, HIV Medicine Association of the Infectious Diseases Society of America, American Association of Public Health Dentistry, Organization for Safety and Asepsis Procedures, American Public Health Association, and Association of Schools of Public Health also concurred in two *amici curiae* briefs to the Eleventh Circuit Court of Appeals that a dental hygienist with HIV does not pose a significant risk of transmission when normal infection control procedures are in place.

that a certain event can occur and (2) that according to reliable medical opinion the event can transmit the disease." (App. A7).

Acknowledging the experts' testimony that a hygienist's fingers and a sharp instrument are rarely simultaneously in a patient's mouth, the court observed that "Waddell still is unable to refute the assertion that an inadvertent bite or some other accident during a cleaning" might lead to events that could pose a risk of transmission. (App. A12-13). The court emphasized that "[n]one of Waddell's medical experts...appear to dispute that transmission theoretically could happen, even though the risk is small and such an event never before has occurred." (App. A12). The court concluded that "[t]his is enough to constitute a significant risk..., given that HIV has catastrophic effects and is inevitably fatal if transmitted to a patient." (App. A12).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This case raises two important questions of federal law. The first is whether a vanishingly small, purely theoretical risk of serious harm, including eventual death, constitutes a "direct threat" as a matter of law under the Americans With Disabilities Act (ADA). The Eleventh Circuit's theoretical risk standard is in sharp conflict with this Court's decision in *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998), a case involving a dentist's refusal to treat a patient with HIV, where this Court recognized the guiding principle that "few, if any, activities are risk-free" and consequently that the inquiry is not "whether a risk exists, but whether it is significant." The Eleventh Circuit's approach also conflicts with decisions of other Circuits and threatens to extinguish protections against disability-based discrimination for any individual whose disability can be

theorized to pose a serious harm to others.

The second question is whether a defendant who raises a "direct threat" defense in an ADA case has the burden of proof on that defense. The Eleventh Circuit's assignment of this burden to the plaintiff reflects a sharp disagreement among the Circuits. This issue merits the Court's resolution in view of its fundamental impact on what constitutes a *prima facie* case.

I. This Court Should Grant Certiorari Because the Eleventh Circuit's Holding That As A Matter of Law An Almost Zero, Purely Theoretical Risk of Harm Resulting in Eventual Death Constitutes a Direct Threat Is in Conflict With Controlling Decisions of This Court.

The Eleventh Circuit Court of Appeals unequivocally held that, as a matter of law, any theoretically supportable theory of HIV transmission will support a "direct threat" finding under the ADA, no matter how minuscule the chance that transmission actually will occur. According to the Eleventh Circuit, "death itself makes the risk 'significant.'" 276 F.3d at 1281 (App. A7). The court's central holding finds no support in this Court's decisions.

The Americans With Disabilities Act ("ADA") provides a defense to a discrimination claim that an employee is a qualified individual with a disability when the plaintiff "pose[s] a direct threat to the health or safety of others." 42 U.S.C. § 12113(b) (Title I); 42 U.S.C. § 12182(b)(3) (Title III). The ADA defines "direct threat" in the workplace as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."

This Court first identified the appropriate standard for determining when an individual with a disability poses a

"significant risk" to others, *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), which requires:

> [findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk, (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Id. at 288. The ADA's direct threat defense is based on the standard articulated in *Arline*. *Bragdon*, 524 U.S. 624, 649 (1998).

Aware of these factors, and faced with a "direct threat" claim as Valley Forge's primary contention, Mr. Waddell independently established that his HIV had no impact on his ability to clean teeth without a measurable, significant risk of harm to patients.[9] For reasons that mirror the expert testimony in this case, knowledgeable public health officials now and in 1997, when Mr. Waddell was terminated, also rejected categorical exclusions of hygienists from continued practice solely because of HIV status.

Nonetheless, the Eleventh Circuit failed to follow

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[9] Mr. Waddell presented testimony from experts who are intimately familiar with the public health science and data that were available at the time he was fired. These experts, eminent in the fields of oral health, dental infection control, and HIV epidemiology, collectively showed that the nature of Mr. Waddell's practice, the rarity of transmission even in the event of an actual exposure, and the effective safeguards that exist virtually eliminate any theoretical risk of hygienist-to-patient transmission of HIV.

Bragdon's guidance and declined to rely on this "prevailing medical consensus," not because of "a credible scientific basis for deviating from the accepted norm," *Bragdon*, 524 U.S. at 650, but because of the failure of Mr. Waddell and his experts to prove that HIV transmission was impossible. Because "[n]one of Waddell's medical experts...appear to dispute that transmission theoretically could happen, even though the risk is small and such an event never before has occurred," the Eleventh Circuit stated, "[t]his is enough to constitute a significant risk...." 276 F.3d at 1283, (App. A12). This standard is in striking conflict with *Bragdon*, which reaffirmed that "*Arline* and the ADA do not ask whether a risk exists, but whether it is significant," and indicated that risk assessments were to be based not "on the absence of contrary evidence" but on "positive data." 524 U.S. at 649, 653.

Proper balancing of the elements of the ADA's direct threat defense contemplates that the statistical likelihood sufficient to establish a direct threat that a harm will occur will become smaller in inverse proportion to the seriousness of the harm that is risked. Nothing in the ADA or this Court's opinions, however, suggests that *any* risk of death greater than absolute zero constitutes a direct threat. Neither does the EEOC's definition of direct threat specify a particular type of risk that conclusively renders that risk significant or insignificant.[10] Removing statistical likelihood from the analysis when the harm is a potentially fatal infection is inconsistent with the four-element framework of the direct threat analysis. Indeed, the harm itself has to be "substantial" before there is even any basis to maintain the analysis should proceed to all four elements. 29 C.F.R. §

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[10] *See* 29 C.F.R. § 1630.2(r)(discrimination is not permitted "merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability of substantial harm; a speculative or remote risk is insufficient.").

1630(r). The standard applied in this case marks a result-altering departure from the standard for determining direct threat developed by this Court.

Evaluating the elements of a direct threat defense with accuracy requires recourse to science, and this Court has insisted on objective medical evidence to ensure that fears and stereotypes about contagiousness do not overwhelm federal anti-discrimination mandates. *See Arline*, 480 U.S. at 287-88. While this Court did not address directly the level of weight to be afforded the "probability" factor of the ADA standard in *Bragdon*, it did provide significant guidance as to the nature of the medical evidence required to establish, or rebut, the existence of a direct threat. After a careful analysis of the record evidence on the possibility that HIV would be transmitted in the course of providing dental care, the Supreme Court in *Bragdon* remanded the case with instructions to evaluate particular pieces of evidence before determining whether Bragdon had created an issue of material fact as to whether he faced a significant risk in providing dental care to a patient with HIV. The Court ordered remand so that risk calculations could be performed with rigor and scientific integrity, without reference to subjective, non-specific notions of risk. *See Bragdon*, 524 U.S. at 649-653.

In addressing whether the dental patient in *Bragdon* posed a "direct threat to the health or safety of others," the Court made explicit one of *Arline*'s fundamental assumptions: "Because few, if any, activities in life are risk free, *Arline* and the ADA do not ask whether a risk exists, but whether it is significant." 524 U.S. at 649. An inquiry into whether an HIV-positive patient poses a significant risk to a health care provider must "assess the level of risk," and consider the "statistical likelihood" of transmission. *Id.* at 652.

In *Bragdon*, the fact that the risk of HIV transmission was greater than zero was the backdrop for the

Court's discussion of the issue. The defendant dentist's evidence of possible transmission of HIV to seven dental workers fell short of the proof of "significant risk" that the Court demanded. *Id.* at 653. The Court's direction to "assess the level of risk," *id.* at 652, and its remand order, would have been wholly superfluous if mere proof of a theoretically recognized risk of fatality were enough to establish a direct threat. The *Bragdon* standard, if applied to the undisputed facts of this case, undoubtedly would have produced a different result.

The heart of the direct threat determination, then, involves an assessment of medical and scientific data on whether, in view of the seriousness of the harm and the statistical likelihood that the risked event will occur, that risk is significant. If medical opinion unchallenged by qualified experts concludes that a risk has almost no statistical chance of occurring, the reviewing court is without power under either the ADA or this Court's relevant decisions to discard that conclusion—no matter how serious the harm might be—because of its belief that there is some basis for finding a theoretical possibility of it happening.

Were this not the case, a host of imaginable disasters could be hypothesized to exclude virtually any individual with a disability, regardless of an individualized assessment of a particular plaintiff's impairment, skills, or specific job requirements. The Eleventh Circuit rejected evidence that a particular harm had never occurred as unimportant, *Waddell*, 276 F.3d at 1280 (App. A8), and saddled plaintiffs with the virtually impossible burden of proving that something that never has happened won't occur in the future.

Consequently, the Eleventh Circuit's analysis has implications far beyond health care assistants such as Mr. Waddell. It threatens to insulate from challenge virtually any discrimination against persons with disabilities in employment, health care, education, and every other aspect of community life. To prevail, all an employer must argue is

that the plaintiff's disability poses some imaginable, non-zero risk of a catastrophic occurrence resulting in possible death. *Waddell's* reasoning permits, for example, an employer's refusal to hire an HIV positive applicant for an office job because of the remote risk that she might cut herself on a staple and expose a co-worker to her blood, a scenario impossible to definitively disprove. A teacher with HIV also would be unable to prove that no child in her classroom is capable of suddenly seizing his arm, biting it, and having the sufficient confluence of blood, high viral load and breaks in the skin of the mouth to accomplish the statistically extremely unlikely event of HIV transmission. A firefighter with hepatitis C can not prove that, in the course of a rescue, he will never be unable to use infection control equipment on a victim in need of resuscitation and that it will be impossible to transmit his disease. A wheel-chair bound day care manager could not prove that he will never be needed to assist a worker in getting children out of a building in the case of a fire and that nothing will interfere with his ability to do that.

Bragdon applied a four-prong test that demands positive evidence on each prong; the Eleventh Circuit applied a different standard altogether. The dissonance of the Eleventh Circuit's approach is perhaps most apparent in the context of *Bragdon* itself. Application of the Eleventh Circuit's theoretical-risk standard to the record in *Bragdon*, which included known reports on documented HIV transmissions from patient to health care worker, coupled with an ability to hypothesize events producing a scientifically sound, if theoretical, possibility of infecting Dr. Bragdon, would have produced the result that as a matter of law Sydney Abbott posed a direct threat, rendering a remand unnecessary.

II. This Court Should Grant Certiorari Because the Eleventh Circuit's Opinion Increases the Confusion Among the Courts of Appeals As To Whether A Purely Theoretical Risk of Serious Harm, Including Death, Is Sufficient to Constitute A Direct Threat As A Matter of Law.

The Eleventh Circuit's approach marks not only a parting from this Court's opinions, but also reflects a larger disagreement among the Circuits on how risk should be quantified under the ADA when the harm at issue poses potentially fatal consequences. In their most recent rulings on the issue, the Eleventh and Fourth Circuits have concluded that any risk of death, however remote and speculative, is significant, while the First, Fifth, Sixth, and Ninth have declined to find that even the risk of death is significant if the probability that it will occur is extremely small.[11]

Similar to the Eleventh Circuit's approach, the Fourth Circuit weighted the factor of harm from HIV infection to such a degree that *any* risk that death or

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[11] As discussed below, the Sixth Circuit's most recent ruling on this issue rejects a "no theoretical risk" application of the *Arline* standard. In an earlier case involving an HIV positive surgical assistant, however, the Sixth Circuit found in the context of considerable testimony from both parties that evidence of an extremely small probability of occurrence is sufficient as a matter of law when the possible transmission of HIV was involved. *See Estate of Mauro v. Borgess Med. Ctr.*, 137 F.3d 398, 405, 407 (6th Cir. 1998) (affirming summary judgment against surgical technician despite evidence that employee rarely had his fingers in the vicinity of a surgical incision, and even though CDC estimated the odds of transmission from a surgeon to a patient as in the 1 in 42,000 to 1 in 420,000 range). Consequently, it is unclear whether the Sixth Circuit's more recent decision in *Hamlin v. Charter Township of Flint*, 165 F.3d 426 (6th Cir. 1999) reflects its current view of the appropriate standard in all cases, or the fact that serious infectious disease prompts application of a more exacting (and inappropriate) test.

transmission will occur, even if never previously documented in the setting at issue, is sufficient basis for a finding of direct threat. In *Montalvo v. Radcliffe*, 167 F.3d 873 (4th Cir. 1999), *cert denied*, 528 U.S. 813 (1999), addressing the exclusion of an HIV positive child from a group karate class, the court found that because of the mere theoretical *possibility* of HIV infection "from blood splashing into the eyes or onto seemingly intact skin," the youngster posed a direct threat to other children. 167 F.3d at 877-78. The court never addressed the *statistical likelihood* of whether HIV can be transmitted through blood contact during athletic activity.[12]

In contrast, as this court noted, "for the most part" the First Circuit Court of Appeals in the initial *Bragdon* appeal "followed the proper standard in evaluating the petitioner's position and conducted a thorough review of the evidence." 524 U.S. at 650. In *Bragdon v. Abbott*, 163 F.3d 87 (1st Cir. 1998)(decision after remand), *cert. denied*, 526 U.S. 1131 (1999), 119 S.Ct. 1805 (1998), the First Circuit again rejected a dentist's argument that providing routine dental care to a patient with HIV created a direct threat to himself and others. The defendant dentist in that case had presented expert evidence to support his position and relied principally on forty-two documented cases of HIV transmission from patients to health care workers, seven cases of "possible" HIV transmission from patients to dental workers, and a CDC report of likely transmission from a dentist to six patients.

In its first decision, the First Circuit had found that this evidence was not sufficient to create a triable factual

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[12] In fact, the Centers for Disease Control and Prevention (CDC) reports that "[t]here are no documented cases of HIV transmitted during participation in sports." Centers for Disease Control and Prevention, *HIV/AIDS Prevention Update* (Nov. 30, 1998), http://dvd.gov.nchstp/hiv_aids/pubs/faq/faq30.htm (visited June 18, 1999).

issue of the existence of "significant risk," assessing each piece of evidence in turn as not comparable to the setting and personnel at issue, as "too speculative," or as failing to "quantitate the risk of HIV transmission." *See Abbott v. Bragdon*, 107 F.3d 934, 946, 947 (1st Cir. 1997), *aff'd in part, vacated and remanded in part*, 524 U.S. 624 (1998). On remand, the First Circuit reexamined the evidence according to this Court's direction, and readopted its previous holding:

> We previously held that [the evidence of documented and possible cases of HIV transmission in the health care setting] was insufficient without a documented showing that the risks to dentists and other health-care workers are comparable, *see* 107 F.3d at 947, and the appellant offers us no cogent reason to change our view...Our assessment of Dr. Bragdon's, and his amici's, other reprised arguments similarly remains unchanged. Each piece of evidence to which they direct us is still "too speculative or too tangential (or, in some instances, both) to create a genuine issue of material fact." *Id.* At 948.

Bragdon v. Abbott, 163 F.3d at 90.

The Fifth Circuit, in *Rizzo v. Children's World Learning Ctrs.*, 84 F.3d 758 (5th Cir. 1996), also applied the four-prong direct threat test in a manner that took into account the factor of the probability that harm, including death, could occur. Reversing a decision to remove a hearing-impaired employee from her school van driving responsibilities on the basis that she might not hear a choking child in the back of the bus, the court acknowledged that any risk of harm to children "will greatly impact the consideration of '[t]he nature and severity of the potential

harm,'" 84 F.3d at 764. However, the Fifth Circuit held that the lower court had not properly considered whether the harm in question was *significantly likely* to occur. *Id.* The Court remanded the case for a trial on whether the school could in fact establish that Rizzo's relative abilities to hear and respond to a choking child in fact made her a direct threat to the children she transported.

In *Hamlin v. Charter Township of Flint*, 165 F.3d 426 (6th Cir. 1999), the Flint Township Fire Department defended its termination of Hamlin, a firefighter, after he had suffered a heart attack and had to avoid strenuous physical activities by arguing that Hamlin posed a direct threat as a consequence of his physical inability to engage in active firefighting duties. Flint pointed to the unpredictability of a firefighter's work environment, and the possibility that the "first responder" to a scene might be needed to rescue someone trapped inside a building. The Sixth Circuit Court of Appeals rejected this line of reasoning, stating that it is a violation of the ADA to deny an opportunity to a person with a disability "merely because of a slightly increased risk":

> The risk can only be considered when it poses a significant risk, i.e., a *high probability* of substantial harm; *a speculative or remote risk is insufficient.* Flint failed to show that there was " a high probability of potential harm...or that the alleged risk was anything more than speculative or remote."

Id. at 432.

The Eleventh Circuit's application of *Arline* and *Bragdon* also conflicts with that of the Ninth Circuit in *Chalk v. United States Dist. Court*, 840 F.2d 701, 709 (9th Cir. 1988). Applying the *Arline* test to a Rehabilitation Act case, the court held that "it was error to require that every

theoretical possibility of harm be disproved." *Chalk* held that a schoolteacher with AIDS should not have been removed from the classroom because he did not pose any real risk to his students. While acknowledging that the risk that the teacher would transmit HIV to any student was minimal, the district court had concluded that the risk nonetheless was "significant" because of the severe consequences of infection. Reversing, the Ninth Circuit found that the district court had failed to follow *Arline* by discounting scientific evidence that the likelihood of transmission was very slight. 840 F.2d at 708-09.

Several years after this Court's decision in *Bragdon*, the lower courts interpret the four-prong direct threat standard in a manner that effectively ensures that the same plaintiff with the same facts can expect very different outcomes depending on the circuit in which he finds himself, revealing a lack of clarity with significant consequences that this Court should address.

III. Certiorari Also Is Necessary to Resolve The Conflict Among the Courts of Appeals As To Which Party Bears the Burden of Proof On A Direct Threat Defense.

Most of the Courts of Appeals have addressed the issue of which party bears the burden of proof on the existence of a direct threat under the ADA; what has emerged is a confusing divergence of opinion on the proper interpretation of a central part of the statute. With many of these cases resolved on summary judgment, the resolution of this dispute is of critical importance to parties with ADA claims, and one that requires this Court's intervention.

The Circuits' handling of the burden of proof on direct threat reveals confusion on a matter that affects the threshold issue of what constitutes a plaintiff's *prima facie* case. The Eleventh Circuit in this case, *see* 276 F.3d at

1280, and the First Circuit, in *EEOC v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997) place the burden on the plaintiff as part of a *prima facie* case demonstrating that the plaintiff with a disability also is qualified. Taking the opposing view that, consistent with the position of the EEOC, places the burden of proving a direct threat defense squarely on the employer are the Fifth Circuit, *see Rizzo v. Children's World Learning Ctrs., Inc.*, 213 F.3d 209 (5th Cir. 2000); the Seventh Circuit, *see Dadian v. Vill. of Wilmette*, 269 F.3d 831 (7th Cir. 2001); *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995); the Eighth Circuit, *see Stafne v. Unicare Homes*, 266 F.3d 771 (8th Cir. 2001); the Ninth Circuit, *see Hutton v. Elf Atochem N. America, Inc.*, 273 F.3d 884 (9th Cir. 2001); and the Tenth Circuit, *see Hartog v. Wasatch Acad.*, 129 F.3d 1076 (10th Cir. 1997).

The confusion as to which party must establish the presence or absence of a direct threat, and as basic a question as what burdens of proof an ADA plaintiff must assume in making a *prima facie* case, impair the ability of parties to an ADA case to litigate their claims in an effective and efficient matter. The Court should grant *certiorari* to resolve this unpredictability in a fundamental aspect of the statute.

CONCLUSION

For the reasons set forth above, the petition for writ of *certiorari* should be granted.

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Dated: March 21, 2002

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-14896

D.C. Docket No. 99-00262-CV-CAP-1

SPENCER WADDELL,

Plaintiff-Appellant,

v

VALLEY FORGE DENTAL ASSOCIATES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(December 21, 2001)

Before BIRCH, MARCUS and WOOD[1], Circuit Judges.
BIRCH, Circuit Judge:

Spencer Waddell appeals the district court's order

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[1] Honorable Harlington Wood, U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

granting summary judgment to the defendant, Valley Forge Dental Associates, Inc., on his discrimination claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., and the Rehabilitation Act, 29 U.S.C. § 701 et seq. This case requires us to decide whether the district court properly held that Waddell, an HIV-positive dental hygienist, was not otherwise qualified for his employment position because he posed a direct threat to his patients. We AFFIRM.

I. BACKGROUND

Waddell, a dental hygienist licensed by the State of Georgia, was employed by Dr. Eugene Witkin from early 1996 until October 1997. In February 1997, Valley Forge took over Witkin's practice. Under this agreement, Witkin and his employees became Valley Forge's employees.[1] Waddell's primary responsibility as a dental hygienist for both Witkin and Valley Forge was the performance of routine prophylaxis, or, in lay terms, the cleaning of teeth.

In September 1997, Dr. Sourignamath Bhat administered a test to Waddell to determine whether he carried the human immunodeficiency virus ("HIV"). Waddell's test results indicated that he was HIV-positive. Bhat telephoned Witkin to inform him of Waddell's test results, and Witkin in turn alerted Jill Whelchel, a dental hygienist and administrator at Valley Forge, to Waddell's status. Whelchel contacted Jean Welsko in Valley Forge's Human Resources Department and sought advice on how to

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[1] Subsequent to Waddell's disassociation from the practice, Monarch Dental Associates acquired Valley Forge and became its successor-in-interest. For the sake of convenience, we will refer to the Defendant-Appellee as "Valley Forge."

handle the situation. On Welsko's suggestion, Witkin and Whelchel met with Waddell and put him on paid leave until the three of them could decide what action should be taken. During the next week, Witkin studied his stockpile of dental journals to glean information about the transmission of HIV in the dental context. The Centers for Disease Control and Prevention ("CDC") also was consulted concerning the risk of transmission. Witkin and Whelchel then met with Waddell again and told him that he could no longer treat patients because of his HIV-positive status. They offered Waddell a clerical job at the front desk at roughly half of the salary he had made as a dental hygienist. Waddell took another week off to consider the proposition, and when he ultimately refused to accept the offered job at the offered rate of pay, Valley Forge terminated his employment.

Waddell brought this suit against Valley Forge, seeking relief under the ADA, the Rehabilitation Act, and various Georgia statutory provisions. After conducting discovery, both Waddell and Valley Forge moved for summary judgment. The issues on the ADA claim were limited by the fact that Valley Forge admitted that its decision to remove Waddell from his position as a dental hygienist was based solely on his HIV-positive status. The bulk of the evidence presented in support of the summary judgment motions addressed the question of whether Waddell's HIV-positive status made him a direct threat to dental patients, which would preclude him from demonstrating that he was qualified to perform the duties of a dental hygienist. See 42 U.S.C. § 12113(b). The district court found that Waddell's job entailed "exposure-prone" procedures as that term has been defined by the CDC, and that the necessity of performing the procedures made Waddell a direct threat under the standard we set forth in Onishea v. Hopper, 171 F.3d 1289, 1299 (11th Cir. 1999) (en

banc). Consistent with this finding, the district court denied Waddell's motion for summary judgment and instead granted summary judgment in favor of Valley Forge.[2] Waddell appeals the district court's ruling on both summary judgment motions.

II. DISCUSSION

We review the district court's decision to grant summary judgment de novo, and in so doing we apply the same legal standards that were applicable in the trial court. See Hilburn v. Murata Elecs. N. Am., Inc., 181 F.3d 1220, 1225 (11th Cir. 1999). "Summary judgment is proper if the pleadings, depositions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Pritchard v. Southern Co. Servs., 92 F.3d 1130, 1132 (11th Cir. 1996); see also Fed. R. Civ. P. 56(c). There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor. Patterson & Wilder Constr. Co. v. United States, 226 F.3d 1269, 1273 (11th Cir. 2000).

In order to establish a prima facie case of discrimination under the ADA, Waddell "must demonstrate that [he] (1) is disabled, (2) is a qualified individual, and (3) was subjected to unlawful discrimination because of [his] disability." Cash v. Smith, 231 F.3d 1301, 1305 (11th Cir.

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[2] The district court granted summary judgment for Valley Forge on Waddell's Rehabilitation Act claim on the ground that Waddell had produced no evidence that Valley Forge receives financial assistance from the federal government. Having granted Valley Forge summary judgment on all of Waddell's federal claims, the district court declined to exercise pendent jurisdiction over Waddell's state-law claims.

2000); see also 42 U.S.C. § 12112(a).[3] As they did in the district court, the parties on appeal focus their arguments on whether Waddell is a qualified individual under § 12112(a).[4]

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[3] Waddell appeals the summary judgment on his Rehabilitation Act claim on the same grounds that he appeals the summary judgment on his ADA claim. The district court, however, granted summary judgment on the two claims for different reasons. Because Waddell does not address the district court's rationale for granting summary judgment on his Rehabilitation Act claim, we deem his appeal on that issue waived. In any event, because we evaluate claims brought under the Rehabilitation Act and the ADA under the same standards, Sutton v. Lader, 185 F.3d 1203, 1207-08 n.5 (11th Cir. 1999), our conclusion that Waddell is not otherwise qualified for his employment position is fatal to both his Rehabilitation Act and ADA claims.

[4] Valley Forge also argues that Waddell has failed to establish that he is disabled because his asymptomatic HIV does not substantially limit one of his major life activities and because HIV is not a disability per se . See 42 U.S.C. § 12102(2)(A). Waddell alleges in his pleadings that HIV has substantially limited his intimate and sexual relationships, his participation in societal and community life, his ability to plan his life and care for himself, and his ability to travel. Even if we assume that these constitute major life activities, we cannot determine whether Waddell is substantially limited as to any of these, given that we have before us such a skeletal record on the issue.

As to the disability per se issue, we recognize that some of our past cases suggest in dicta that HIV should be treated as a per se disability. See, e.g., Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1445 n.5 (11th Cir. 1998). We note, however, that in Bragdon v. Abbott, the Supreme Court declined to address whether asymptomatic HIV is a per se disability, arguably suggesting, at least implicitly, that the preferred method is to address whether an impairment causes a substantial limitation upon a major life activity on a case-by-case, individualized basis. 524 U.S. 624, 641-42, 118 S. Ct. 2196, 2207 (1998). Two recent cases further demonstrate that the Supreme Court favors an individualized analysis. See Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 119 S. Ct. 2162 (1999); Sutton v. United Airlines, Inc., 527 U.S. 471, 119 S. Ct. 2139 (1999). Nevertheless, we need not address whether Waddell is disabled, either on the theory that he is substantially limited in a major

Specifically, the parties debate whether the risk of Waddell transmitting HIV to a patient in the course of treatment poses a direct threat to others in the workplace. See 42 U.S.C. § 12111(3). Waddell carries the burden of establishing that "he was not a direct threat or that reasonable accommodations were available." LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 836 (11th Cir. 1998). If he cannot meet this burden, he is not a qualified individual and therefore cannot establish a prima facie case of discrimination.

The term "direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). Addressing this issue, the Supreme Court explained in School Board of Nassau County v. Arline that "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." 480 U.S. 273, 287 n.16, 107 S. Ct. 1123, 1131 n.16 (1987). To determine whether an employee who carries an infectious disease poses a significant risk to others, the Supreme Court has stated that courts should consider several factors, which include:

> [findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk, (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and

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life activity or on the theory that HIV is a disability per se. Because we agree with the district court that Waddell is not a qualified individual under the ADA, we do not reach the disability issue.

will cause varying degrees of harm.

Id. at 288, 107 S. Ct. at 1131 (citation omitted). The Supreme Court also has indicated that an employer in the medical field, "[a]s a health care professional, . . . ha[s] the duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession," Bragdon, 524 U.S. at 649, 118 S. Ct. at 2210, and that his employment decision concerning an infected employee must be "reasonable in light of the available medical evidence," irrespective of whether his decision was made in good faith, id. at 650, 118 S. Ct. at 2211. See also Lowe v. Alabama Power Co., 244 F.3d 1305, 1308 (11th Cir. 2001) (noting "that a good-faith belief that a significant risk of harm exists is insufficient if it is not grounded in medical or other objective, scientific evidence").

We have not had occasion to apply the significant risk analysis enunciated in Arline and Bragdon to a case involving an HIV-positive employee in the medical field, as is the situation here. In Onishea, however, even though the facts did not involve an employee in the medical field, the disability at issue was HIV infection, and in that case we elaborated on the meaning of "significant risk," holding that "when transmitting a disease inevitably entails death, the evidence supports a finding of 'significant risk' if it shows both (1) that a certain event can occur and (2) that according to reliable medical opinion the event can transmit the disease." 171 F.3d at 1299. We noted that "when the adverse event is the contraction of a fatal disease, the risk of transmission can be significant even if the probability of transmission is low: death itself makes the risk 'significant.'" Id. at 1297. Moreover, we emphasized that although the "asserted danger of transfer must be rooted in sound medical opinion and not be speculative or fanciful[,] . . . this is not a

'somebody has to die first' standard, either: evidence of actual transmission of the fatal disease in the relevant context is not necessary to a finding of significant risk." Id. at 1299.

Applying these principles to the case at hand, we conclude that the record establishes that the district court properly granted summary judgment to Valley Forge because an HIV-infected dental hygienist like Waddell poses a significant risk of HIV transmission to his patients. The district court concluded that Waddell posed a significant risk based on the two-part test we delineated in Onishea, 171 F.3d at 1299. The court found that a certain event could occur — a dental hygienist like Waddell could cut or prick his finger while performing a procedure in a patient's mouth, and the hygienist's blood then could come into contact with an oral cut or abrasion. The court also found that the procedures used to clean teeth were "exposure- prone" based on the CDC definition of that term,[5] and therefore that reliable

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[5] In 1991, the CDC issued a set of recommendations for management of healthcare workers infected with HIV or Hepatitis B. With reference to exposure-prone procedures, the recommendations state:

> Characteristics of exposure-prone procedures include . . . the simultaneous presence of the HCW's [healthcare worker's] fingers and a needle or other sharp instrument or object in a poorly visualized or highly confined anatomic site. Performance of exposure-prone procedures presents a recognized risk of percutaneous injury [skin piercing] to the HCW, and – if such an injury occurs — the HCW's blood is likely to contact the patient's body cavity, subcutaneous tissues, and/or mucous membranes.

Centers for Disease Control and Prevention, Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures, Morbidity & Mortality Weekly Report 4 (1991) (R2-18 Exh. J).

medical opinion indicated that if the certain event occurred, Waddell could expose a patient to HIV.

In reaching these conclusions, the district court considered the four factors laid down in Arline, 480 U.S. at 288, 107 S. Ct. at 1131. As to the first factor, the nature of the risk, the district court found that HIV is transmitted when infected blood or other bodily fluids come into contact with the blood, mucous membrane, or other fluids of another person. Neither party on appeal contests this issue, and both parties agree that any risk of HIV transmission in the dental setting would arise from contact between Waddell's blood and an open wound or mucous membrane of a patient.

As to the second factor, the duration of the risk, the court found that HIV infection is indefinite because there is no cure for HIV at this time. Again, both parties agree on this point. As to the third factor, the severity of the risk to third parties, the court found that the potential harm to a person infected is eventual death. Although in this litigation Waddell attempted to downplay the effects of HIV infection on the individual, the court's conclusion on this point appears incontrovertible, especially since Waddell himself admits that there is no current cure for HIV infection. See also Bragdon, 524 U.S. at 633-37, 118 S. Ct. at 2203-04 (discussing the unalterable and catastrophic consequences of HIV infection on the individual).

At the heart of this case, however, is the district court's analysis of the fourth factor delineated in Arline, the probability of HIV transmission between a dental hygienist and patient. The court noted that because Waddell performed some procedures that entailed the use of sharp instruments, there was a risk that he could cut or prick himself and bleed into an open wound or abrasion in the patient's mouth.

Although the court determined that the likelihood of transmission from a healthcare worker to a patient was low, the court found that there was a sound, theoretical possibility that Waddell could transmit HIV to a patient. For this reason, the court concluded that based on our definition of significant risk in Onishea, 171 F.3d at 1299, Waddell posed a direct threat to patients at his workplace and thus was not a qualified individual under the ADA.

Even though Waddell and his experts downplay the procedures Waddell had to perform as a dental hygienist and argue that these procedures are not exposure-prone, we agree with the district court's analysis for several reasons. The uncontroverted evidence establishes that dental cleaning procedures involve the use of sharp objects. In his deposition, Waddell noted that a normal teeth cleaning entailed the performance of "scaling" and "root planing" on the patient. Scaling involves the removal of material from teeth at points above the gumline, and root planing involves the removal of material below the gumline. One of Waddell's medical experts, Dr. Donald Marianos, indicated that scaling involves the use of a sharp instrument. For the root-planing procedure, Waddell stated that he would use "a dental instrument designed with a single blade to cut towards [the] working surface." Waddell Dep. at 29 (R4-34).

The unrebutted evidence also shows that during routine procedures like scaling and root planing, blood of the patient is commonly present. Waddell, in his own deposition, noted that during the scaling procedure, the patient's blood was present in "most" cases. Id. at 28. He noted that during the root-planing procedure, "there should always be" blood of the patient present. Id. at 29. Indeed, in his appellant brief, Waddell acknowledges that "patient bleeding during a routine dental checkup is a common

experience." Appellant Br. at 33.

The combination of sharp instruments used by the hygienist and a patient's blood commonly being present indicate that the hygienist could cut or prick himself with such an instrument, pierce the skin of his protective glove, and transfer his blood into the patient's mouth, where it would come into contact with an oral cut or abrasion. In fact, the uncontroverted evidence establishes that a dental worker sometimes does stick or cut himself or herself during treatment. For instance, Waddell related that one time when he was performing scaling work on a patient, he turned away from the patient to replace the scaler tip. The scaler tip broke and scratched his skin, and he had to take a break to ensure that the bleeding had stopped and to bandage the site. Valley Forge dental hygienist and administrator, Whelchel, also told in her deposition of an incident that occurred when she was cleaning teeth. She stated that while she was using an instrument on a patient, the tip cut the skin of her finger, which was inside the patient's mouth and near the tongue.

It is true that there is some dispute between the parties as to how often a dental hygienist's fingers are present in a patient's mouth at the same time as sharp instruments. Waddell's own objective medical evidence on this point, however, indicates that a hygienist's fingers are in a patient's mouth along with a sharp instrument at least some of the time. For example, Dr. Marianos, one of Waddell's medical experts, stated that a hygienist's fingers and dental instruments are "rarely," in the patient's mouth at the same time. Marianos Aff. at 5 (R3-27). By negative implication, of course, Marianos's statement suggests that at least in some instances, both finger and instrument are in the patient's mouth simultaneously.

In addition, it is important to note that Waddell and his experts in fact acknowledge that there is a possibility of blood-to-blood contact between hygienist and patient, irrespective of precisely how often a hygienist's fingers are in a patient's mouth alongside a sharp instrument. For instance, while Waddell notes in his appellant brief that the exposure of a patient to HIV will not occur during routine procedures, he concedes that "[p]ercutaneous . . . injuries resulting in blood-to-blood contact theoretically provide opportunities for transmission." Appellant Br. at 36. None of Waddell's medical experts, moreover, appear to dispute that transmission theoretically could happen, even though the risk is small and such an event never before has occurred. This is enough to constitute a significant risk under Onishea, given that HIV has catastrophic effects and is inevitably fatal if transmitted to a patient. In Onishea, we agreed with the Fourth, Fifth, and Sixth Circuits that:

> a showing of a specific and theoretically sound means of possible transmission [is] enough to justify summary judgment against an HIV-positive plaintiff on the ground that the infection pose[s] a 'significant risk' to others in the workplace, even though reported incidents of transmission [are] few or nonexistent, and the odds of transmission [are] admittedly small.

171 F.3d at 1297. The district court's grant of summary judgment to Valley Forge is consistent with this language because even a small and "theoretically possible method of [HIV] transmission" from Waddell to a patient — a risk that even Waddell's medical experts acknowledge — can create a significant risk under the ADA because transmission, if it occurs, is fatal. Id. at 1299.

We also point out that even if there remains some

question as to how often Waddell's hand would be in a patient's mouth at the same time as a sharp instrument, Waddell still is unable to refute the assertion that an inadvertent bite or some other accident during a cleaning could lead to the mixture of Waddell's blood with a patient's blood due to an oral cut or abrasion. Indeed, the CDC has noted that with regard to dentistry, "trauma," in one form or another, "to health-care workers' hands is common." Centers for Disease Control and Prevention, Update: Universal Precautions for Prevention of Transmission of Human Immunodeficiency Virus, Hepatitis B Virus, and Other Bloodborne Pathogens in Health-Care Settings, Morbidity & Mortality Weekly Report 379 (1988) (R2-18 Exh. K). For example, a child patient (or even an adult) could bite down on a hygienist's finger in a moment of fear, pain, anger, or surprise, causing blood to be transmitted into the child's (or adult's) mouth. Waddell himself, in fact, acknowledged in his deposition that he had heard of dental hygienists who had been bitten by patients.

In summary, several factors, when taken together, indicate that Waddell poses a significant risk to others in the workplace: the use of sharp instruments by dental hygienists; routine patient bleeding during dental work; the risk that hygienists will be stuck or pricked while using an instrument; the statements of Waddell and medical his experts acknowledging that there is some risk, even if theoretical and small, that blood-to-blood contact between hygienist and patient can occur; and the possibility of an inadvertent bite or other accident during a dental cleaning. These "particularized facts" provide "the best available objective evidence" that Waddell, because he is infected with the fatal, contagious disease of HIV, is a direct threat to his workplace, and therefore not a qualified individual under the ADA. Lowe, 244 F.3d at 1309.

III. CONCLUSION

In this appeal, Waddell has argued that the district court erred in denying his motion for summary judgment on his claims under the ADA and the Rehabilitation Act and in granting Valley Forge's summary judgment motion. We have decided that the district court was correct in finding that there was no genuine issue of material fact and that Valley Forge was entitled to judgment as a matter of law on the issue of whether Waddell was a qualified individual. Waddell never controverted the fact that if a certain event occurred — a cut or abrasion to the finger of Waddell while performing dental procedures in a patient's mouth caused by a sharp instrument, an inadvertent bite, or some other accident — there was a specific, theoretically sound possibility of transmission. Because there was such a possibility of transmission, the risk involved, in light of Onishea, was significant due to the fatal nature of HIV. Accordingly, we AFFIRM.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SPENCER WADDELL,
Plaintiff,

CIVIL ACTION NO.
1:99-CV-0262-CAP

v.

VALLEY FORGE DENTAL ASSOCIATES, INC., AND JOHN DOE, as successor-in-interest of VALLEY FORGE DENTAL ASSOCIATES, INC.,
Defendants.

ORDER

The plaintiff filed the instant action, alleging he was terminated by Valley Forge Dental Associates, Inc. ("Valley Forge") in violation of the Americans with Disabilities Act ("ADA"), the Rehabilitation Act ("Rehab Act"), O.C.G.A §§ 34-6A-1 et seq., and 30-1-2. Mr. Waddell also asserts a claim for breach of a legal duty under Georgia Law. This matter is before the court on the defendants' motion for summary judgment [Doc. No. 18-1], the plaintiff's motion for partial summary judgment [Doc. No. 19-1], as well as several other motions involving expert witnesses. There is also a motion by the plaintiff for leave to file a brief in excess of page limits [Doc. No. 23-1].

The plaintiff's motion for leave to file his brief in excess of page limits [Doc. No. 23-1] is hereby GRANTED.

Expert Witness Motions

As a preliminary matter, the court hereby GRANTS the plaintiff's motion to substitute the affidavit of Donald Marianos [Doc. No. 27-1], which MOOTS the plaintiff's similar motion to substitute [Doc. No. 24-1].

In their motions to strike the plaintiff's experts' affidavits [Doc. No. 22-1] and to strike the supplemental affidavit of Donald Marianos [Doc. No. 32-1], the defendants object to the affidavits because they contend that the reports filed by the plaintiff pursuant to Fed.R.Civ.P. 26(a) (2) were insufficient in that the reports did not include all of the opinions that were contained in the subsequent affidavits. The defendants contend that based on these reports, they chose not to depose the plaintiff's experts. While the court finds that the reports were not as explicit as they could have been, the defendants were certainly on notice that these experts were going to provide testimony relevant to this case and should have deposed them during discovery. Therefore, the defendants' motions to strike the plaintiff's experts' affidavits [Doc. Nos. 22-1; 32-1] is DENIED.

The plaintiff has also moved to strike the defendants' expert [Doc. No. 26-1]. The plaintiff contends that the testimony of Dr. Harris, the defendant's expert, should not be allowed because he was not named until very late in discovery. The court finds that because the defendants did not receive all of the plaintiff's expert reports until late in discovery, the defendants were justified in not naming their expert sooner. Therefore, the plaintiff's motion to strike the defendants' expert is hereby [Doc. No. 26-1] DENIED.

Summary Judgment Motions

Currently pending before the court are the defendants' motion for summary judgment [Doc. No. 18-1] and the

plaintiff's motion for partial summary judgment [Doc. No. 19-1]. In analyzing a summary judgment motion, the court resolves all issues of fact in favor of the non-movant. See Cottrell v. Caldwell, 85 F.3d 1480 (11th Cir. 1996). Here, because both parties have moved for summary judgment and the court finds in favor of the defendant, it states the facts of the case in the light most favorable to the plaintiff. Therefore, the facts, as stated below, may not prove to be the facts that would be established at trial. See Hartsfield v. Lamacks, 50 F.3d 950, 951 (11th Cir. 1995) (citing Rodgers v. Horsley, 39 F.3d 308, 309 (11th Cir. 1994)).

FACTUAL DISCUSSION

The claims in this case arise from the termination of the plaintiff, Spencer Waddell, by defendant Valley Forge Dental Associates, Inc.[6] Mr. Waddell is a dental hygienist who was employed by the defendants from 1993 until October 1997. Sometime in 1995, Mr. Waddell temporarily left the employ of the defendants, but returned in 1996.

In September 1997, Mr. Waddell underwent an HIV test, which was performed by Dr. Sourignamath Bhat. The test results revealed that Mr. Waddell was infected with the human immunodeficiency virus (HIV), the virus that causes AIDS. At all relevant times, Mr. Waddell's condition has been asymptomatic. Dr. Bhat phoned Dr. Eugene Witkin, the defendants' regional director and Mr. Waddell's supervisor, to inform him that Mr. Waddell had tested positive for HIV.

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[6] The case was originally styled with Valley Forge as one defendant and John Doe, as successor-in-interest of Valley Forge, as the other defendant. In the plaintiff's motion for partial summary judgment, the plaintiff identifies Monarch Dental Associates as the successor-in-interest. The court will use the term "defendants" to refer to Valley Forge Dental Associates, Inc. and Monarch Dental Associates.

Dr. Witkin informed Jill Whelchel, an administrator for the defendants, of Mr. Waddell's condition. Ms. Whelchel then informed the defendants' Human Resources department.

On September 29, 1997, Mr. Waddell was told that he was being put on a temporary leave of absence while the defendants considered his employment status. Dr. Witkin and Ms. Whelchel sought information on HIV and HIV transmission related to dental hygienists. They also sought legal advice from the defendants. On October 10, 1997, based on the information he obtained and, presumably, on the legal advice he received via the defendants, Dr. Witkin told Mr. Waddell that he would no longer be allowed to treat patients. Dr. Witkin offered him a non-clinical, clerical position at a lower salary, which Mr. Waddell declined. The defendants considered this a resignation and terminated Mr. Waddell's employment. Mr. Waddell, believing he was terminated in violation of his rights under the ADA and the Rehab Act, as well as several state statutes, brought this action.

LEGAL ANALYSIS

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment when all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." The party seeking summary judgment bears the burden of demonstrating that no dispute as to any material fact exists. Adickes v. S.H. Kress & Co., 398 U.S. 144, 156, 90 S.Ct. 1598, 1608 (1970); Johnson v. Clifton, 74 F.3d 1087, 1090 (11th Cir. 1996). The moving party's burden is discharged merely by "'showing' -- that is, pointing out to the District Court that

there is an absence of evidence to support [an essential element of] the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986). In determining whether the moving party has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. Clifton, 74 F.3d at 1090. Once the moving party has adequately supported its motion, the nonmovant then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986).

In deciding a motion for summary judgment, it is not the court's function to decide issues of material fact but to decide only whether there is such an issue to be tried. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251, 106 S.Ct. 2505, 2511 (1986). The applicable substantive law will identify those facts that are material. Anderson, 477 U.S. at 247, 106 S.Ct. at 2510. Facts that in good faith are disputed, but which do not resolve or affect the outcome of the case, will not preclude the entry of summary judgment as those facts are not material. Id.

Genuine disputes are those by which the evidence is such that a reasonable jury could return a verdict for the nonmovant. Id. In order for factual issues to be "genuine" they must have a real basis in the record. Matsushita, 475 U.S. at 586, 106 S.Ct. at 1356. When the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." Id. (citations omitted).

Mr. Waddell's Claim Under the Rehab Act

One of Mr. Waddell's claims for discrimination is brought under the Rehab Act, 29 U.S.C. § 791 et seq. The statute states in relevant part:

> No otherwise qualified individual with a disability in the United States...shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....
> 29 U.S.C. §794(a)

Mr. Waddell contends that the defendants receive Federal financial assistance in the form of Medicaid and Medicare payments. The only evidence which he cites is his own affidavit. See Waddell Affidavit ¶ 6 Attached to the Plaintiff's Brief in Support of his Motion for Partial Summary Judgment. However, Mr. Waddell has not alleged that he had any knowledge of the billing practices of the defendants. Conversely, the defendants have offered a declaration by Jill Whelchel, the individual responsible for patient billing at the defendants' office, that the defendants do not accept Medicaid or Medicare. The court finds that there is no material issue of fact that the defendants do not receive Federal financial assistance. Because the defendants do not receive such assistance, they are not subject to the Rehab Act and are entitled to summary judgment as to Mr. Waddell's claims under the Act. 29 U.S.C. §794(a).

Mr. Waddell's Claims Under the Americans with Disabilities Act

In order to prevail under the ADA, Mr. Waddell must prove all three elements of his prima facie case by a

preponderance of the evidence. See Doe v DeKalb County School District, 145 F.3d1441, 1445 (11th Cir. 1998). First, he must show he has a disability. Second, he must demonstrate that he is qualified to work as a dental hygienist, with or without some reasonable accommodation by the defendants, despite his disability. Third, he must show that he has suffered an adverse employment action because of his disability. See Harris v. H & W Contracting Co., 102 F.3d 516, 519, 523-524 (11th Cir. 1996) (discussing the elements of a prima facie case under the ADA).

The court assumes without deciding that Mr. Waddell has a disability under the ADA.[7]
Also, there has been no dispute that Mr. Waddell has suffered an adverse employment action. Therefore, the remaining question is whether Mr. Waddell is qualified. Mr. Waddell has set forth claims under both the ADA and the Rehab Act. As the court has already dismissed his claims under the Rehab Act, the court will only address the issue of whether Mr. Waddell is qualified under the ADA.

A "qualified individual with a disability" is defined as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

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[7] The Eleventh Circuit held in Doe v. DeKalb County School District that a "person infected with HIV is 'disabled' for purposes of the ADA, even if he has not developed AIDS" and cites the Supreme Court's decision in Bragdon v. Abbott, 524 U.S. 624, 118 S.Ct. 2196 (1998), as authority. 145 F.3d 1441, 1445 n. 5 (11th Cir. 1998). The court notes that the better approach is to determine a plaintiff's disability on a case-by-case basis. See Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S.Ct. 2139, 2147 (1999) (holding that whether a person has a disability within the meaning of the ADA is an individualized inquiry); 42 U.S.C. §12102(2).

42 U.S.C. §12111(8). However, a person who poses a significant risk of communicating an infectious disease to others will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. School Board of Nassau County, Florida v. Arline, 480 U.S. 273, 287 n. 16, 107 S.Ct. 1123 (1987).

To determine whether a risk is significant, a district court must review four factors and examine how they interrelate with each other. The four factors are: (1) nature of the risk (how the disease is transmitted); (2) the duration of the risk (how long is the carrier infected) ; (3) the severity of the risk (what is the potential harm to third parties) ; and (4) the probability that the disease will be transmitted and will cause varying degrees of harm. Arline, 480 U.S. at 288, 107 S.Ct. at 1131. "The existence or non-existence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence." Bragdon, 524 U.S. at 649, 118 S.Ct. at 2210. In reviewing these factors, a district court "normally should defer to the reasonable medical judgment of public health officials." Arline, 480 U.S. at 288, 107 S.Ct. at 1131. The reasonable medical judgment of public health officials is only relevant if it assesses the level of risk. Bragdon, 524 U.S. at 652, 118 S.Ct. at 2211.

The evidence presented to the court to assess the significance of the risk that Mr. Waddell could infect a patient are the CDC's Recommendation for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures ("CDC I"); an update of the CDC's publication entitled Recommendations for Prevention of HIV Transmission in Health-Care Settings ("CDC II"); State of

Georgia Guidelines for the Management of the Immunodeficiency Virus (HIV) / Hepatitis B (HBV) Infected Health Care Workers; and several affidavits and expert reports/opinions of health care professionals presented by both the plaintiff and the defendants.

The court finds that the first two reports from the CDC and the affidavits of the health care professionals presented by Mr. Waddell represent the views of objective health care officials, but that the Georgia Guidelines, which are based on the CDC reports, do not. The Georgia Guidelines simply presents the policy of the State and guidelines for precautionary measures, it does not include an assessment of the risk of transmission when a dental hygienist performs procedures on patients. Further, the defendants did not submit the opinion of their expert in the form of an affidavit or declaration. Rather, they merely submitted a copy of the expert's report. It was not sworn to or notarized. Therefore, the court will not consider either the defendants' expert's report or the Georgia Guidelines in determining if Mr. Waddell presents a significant risk.

The Four-Part Inquiry

The parties in this case do not disagree as to the first three inquiries: nature, duration, or severity of the risk. The parties dispute is as to the probability that the disease will be transmitted. However, as all four of these inquiries must be considered together to determine whether Mr. Waddell poses a significant risk to others, the court will briefly discuss each.

First, the nature of the risk is essentially an examination of how the disease is transmitted. HIV is transmitted via blood, mucous membrane, and various bodily fluids such as semen, cerebro-spinal, and others usually as a

result of unprotected sex, sharing needles, in uteri exposure, or any other activity during which infected blood, semen, etc. can enter the blood, mucous membrane, or certain fluids of another person. Update: Universal Precautions for Prevention of Transmission of HIV, HBV, and Other Bloodborne Pathogens in Health-Care Settings ("CDC II"), p. 378.

Second, the duration of the risk, or how long the carrier is affected, is for the life of the infected individual. There is no known cure for HIV or AIDS at this time or at the time of the termination of Mr. Waddell.

Third, the severity of the risk represents the potential harm to third parties. The potential harm in a case where a person becomes infected is eventual death.

Finally, the probability that the disease will be transmitted is disputed by the parties. Initially, there is a dispute as to whether Mr. Waddell performs exposure-prone procedures as a dental hygienist. Mr. Waddell contends that because his hands are not simultaneously present in the mouth of a patient at the same time as sharp instruments, the procedures he performs are not exposure-prone. Mr. Waddell, however, admits that he performs some procedures which entail the use of sharp instruments. The document the court refers to as CDC I states that the "performance of exposure-prone procedures presents a recognized risk of percutaneous injury to the [health care worker], and - if such an injury occurs - the [health care worker's] blood is likely to contact the patient's body cavity, subcutaneous tissues, and/or mucous membranes." CDC I, p. 4. The court finds that the procedures performed by Mr. Waddell are exposure-prone because there is a risk that Mr. Waddell could suffer a percutaneous injury and his blood could contact any open

wounds or exposed mucous membranes of the patient.

The evidence presented by the parties which assesses the risk of transmission is inconsistent. Mr. Waddell's experts contend that he does not perform exposure-prone procedures and, therefore, if he uses universal precautions, there is only a theoretical risk of transmission. Affidavits of David Reznik, Joseph Wilber, John Molinari, and Donald Marianos. This position is supported by the CDC reports which agree that if a healthcare worker does not perform exposure-prone procedures and follows universal precautions, there is almost no risk of transmission. However, the court has already held that the procedures performed by Mr. Waddell are exposure-prone based on the CDC's definition of that term.

Conversely, the CDC reports state that when a healthcare worker performs exposure-prone procedures, there is a risk of transmission. CDC I states that even though at the time of that report a precise assessment of risk of transmission from a healthcare worker to a patient during an invasive procedure was not yet available, the current data suggested that the likelihood of such a transmission was small. Further, CDC I does state that the probability of transmission from a patient to a healthcare worker is assessed at .3%.

The Eleventh Circuit has stated that a test for assessing the results of these four inquiries in a case like the one at bar. When transmitting a disease inevitably entails death, the evidence supports a finding of "significant risk" if it shows both (1) that a certain event can occur and (2) that according to reliable medical opinion the event can transmit the disease. Onishea v. Hopper, 171 F.3d 1289, 1297 (11th Cir. 1999). The Eleventh Circuit in Onishea was careful to

point out that the standard set out is not an "any risk" standard. Id. at 1299. The asserted danger of transmission must be based in sound medical opinion and not be speculative or fanciful. Id. However, evidence of actual transmission in the relevant context is not necessarily before a court can find a person presents a significant risk. Id.

The court finds that based on the objective medical evidence before it, there is a chance that Mr. Waddell could cut or prick himself and bleed into an open wound of a patient, and reliable medical opinions state that this event can transmit the disease. For these reasons, the court finds that Mr. Waddell, as employed as a dental hygienist, presents a significant risk to the patients of the defendants. Because he presents a significant risk, Mr. Waddell is not otherwise qualified and not covered by the ADA. Therefore, the defendants are entitled to summary judgment as to Mr. Waddell's claims under the ADA.

Mr. Waddell's 42 U.S.C. §1981a Claim

Section 1981a does not create an independent cause of action. Galliher v. Rubin, 969 F.Supp. 1329 (S.D.Ga. 1997). Rather, Section 1981a "is wholly dependent . . . on other substantive Acts" like the ADA or the Rehab Act. West v. Boeing Co., 851 F.Supp. 395, 401 (D.Kan. 1994). Section 1981a merely expands the remedies available under substantive acts and should only be regarded as an extension of and amendment thereto. Id. Because Section 1981a is not intended to stand alone as an independent cause of action and given that, in this case, summary judgment with respect to Counts I and II of the plaintiff's complaint has been granted in the defendants' favor, there remains in the plaintiff's action no substantive act, as required in Section 1981a, which may form the basis for unlawful intentional discrimination.

Consequently, summary judgment on the plaintiff's claim for damages under Section 1981a is also granted.

Mr. Waddell's State Law Claims

The court, having granted summary judgment to the defendants on all of Mr. Waddell's federal claims, declines to exercise pendent jurisdiction over his remaining state law claims. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 349-350, 108 S.Ct. 614, 619 (1988)(holding that exercise of pendent jurisdiction is at the discretion of the district court).

CONCLUSION

For the foregoing reasons, the court hereby GRANTS the defendants' motion for summary judgment [Doc. No. 18-1] as to all of the plaintiff's federal claims and declines to exercise pendent jurisdiction over the plaintiff's state law claims; DENIES the plaintiff's motion for partial summary judgment [Doc. No. 19-1]; GRANTS the plaintiff's motion for leave to file in excess of page limits [Doc. No. 23-1]; GRANTS the plaintiff's motion to substitute the affidavit of Donald Marianos [Doc. No. 27-1], which MOOTS the plaintiff's similar motion to substitute [Doc. No. 24-1]; DENIES the defendants' motions to strike the plaintiff's experts' affidavits [Doc. No. 22-1] and to strike the supplemental affidavit of Donald Marianos [Doc. No. 32-1]; and DENIES the plaintiff's motion to strike the defendants' expert [Doc. No. 26-1].

SO ORDERED, this 11th day of August, 2000.

CHARLES A. PANNELL, JR.
United States District Judge